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No. 80-1082

IN THE

# Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
*Petitioner,*

*against*

WILLIAM R. PHILLIPS,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

This brief is in reply to the brief for respondent as well as the *amicus curiae* brief sought to be filed by the American Civil Liberties Union.*

* On August 1, 1981, the American Civil Liberties Union moved to file a brief as *amicus curiae;* that motion had not been decided when this reply brief was completed and ready to be filed. Nonetheless, we have replied to the amicus brief because we were uncertain whether the motion would be denied or granted.

**Respondent's unwarranted and irrelevant speculations cannot be substituted for the factual findings by the state court which are fully supported by the record.**

After finding no fault "in general" with petitioner's statement of the case, respondent says that it would "serve no useful purpose to go through petitioner's factual presentation and point out each and every inaccuracy or misstatement." Brief for Respondent: 2-3. Such a process would serve no useful purpose only because our statement of the case accurately reflects the relevant facts. In contrast, throughout his brief respondent dwells on irrelevancies, and overlooks or ignores the record. Initially, respondent in his counterstatement of the case attempts to suggest there may be some doubt about his guilt. More importantly for our purposes, respondent then attempts throughout his brief to characterize the acts of the juror in question, Smith, in a manner which is unsupported by the record and which was rejected by the state trial judge. Before turning to those mischaracterizations, an examination of other parts of respondent's brief proves interesting.

First, respondent opens his counterstatement of the case with the apparent purpose of suggesting that the proof of his guilt was not overwhelming. Thus, respondent first notes two so-called omissions in petitioner's statement of the case. Relying on newspaper reports that the first trial had ended with the jury deadlocked 10-2 for acquittal, respondent criticizes the omission of that vote from petitioner's statement. Brief for Respondent: 2, 4a-5a. In addition, respondent finds fault with our failure to set forth facts allegedly calling into question the investigating detective's decision to focus on respondent in a three-year-old

murder investigation. *Id.* at 2-3. As to the reported jury vote, of course, a "report" in a newspaper article is hardly a substitute for facts of record. In any event, the proof at the second trial was substantially different and greater than that at the first trial. Most significantly, both the first vote, and the respondent's opinion about the investigating officer, are completely irrelevant to the issue before the Court.

No more relevant or persuasive is respondent's suggestion that the jury deliberations were of an inordinate length. Brief for Respondent: 6, 29. A mere eleven hour deliberation (apparently including both lunch and dinner), after a nine-week trial, is a brief rather than a lengthy period.* In

* Equally incorrect is respondent's suggestion that some of the proof was improper because it was immunized testimony. Brief for Respondent: 29n. The district court did not pass on respondent's immunity claim, *see* Appendix B to Petition for Certiorari: 14a-15a, but that claim is clearly without merit. The evidence in question consisted of a tape recording made by respondent to aid the Knapp Commission investigation into police corruption. That recording showed unequivocally that Phillips had lied when he had later testified at trial that he had terminated his corrupt relationship with the victim Smith well before the murder. True, the evidence in question was important, but despite respondent's suggestion (Brief for Respondent: 29n), the state has never agreed that such evidence had been immunized. Even a reading of the affidavit filed in support of the habeas corpus petition which is appended to respondent's brief (6a-9a) demonstrates that no immunity was ever granted. First, it is undisputed that the Knapp Commission had no power to grant immunity. To be sure, it is alleged that at some unspecified point in time, inquiry was made of the United States Attorney who allegedly said that immunity would be given (apparently at some future time) for information by Phillips which assisted in the federal prosecution of police officers. Still, nowhere in this affidavit is it alleged that any immunity was ever in fact conferred or is it anywhere alleged that the tape in question assisted in the prosecution of any other police officers. Notably, trial counsel never advanced the immunity claim at or before trial and a subsequent post-judgment motion, made nearly three and one half years after conviction, was denied, because the failure to make a timely motion resulted in forfeiture of the claim under state law. *See* N.Y. Crim. Proc. Law §710.70(3); *see also Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (barring federal habeas corpus review of claims which had been forfeited in state court).

sum, respondent's counterstatement of the case tends to emphasize irrelevancies.

Turning to respondent's most significant lack of precision and accuracy, throughout his brief, in an effort to challenge the state judge's finding of Smith's impartiality, respondent consistently overlooks or unintentionally misrepresents the record when representing the facts concerning Smith. For example, respondent states that juror Smith was "busily engaged during most of respondent's trial," seeking employment with the prosecuting agency. Brief for Respondent: 21. In fact, during the nine-week trial, Smith's interest in the position consisted simply of two or three discussions at lunch with an old friend, court officer Fontaine, and the submission of a resume. Notably, all of the other meetings referred to by respondent were, even according to the federal district court, undertaken with neither the knowledge nor the consent of juror Smith. *See* Appendix B to Petition for Certiorari: 25a. In further disregard of reality, respondent says that after submission of the resume, Smith "was meeting *regularly* with Fontaine and [grand] Jury Warden Piazza in an effort to expedite and facilitate its consideration." Brief for Respondent: 21 (emphasis added). Actually, however, Smith had lunch with Fontaine on only two occasions after the application had been submitted. Moreover, except for one fortuitous meeting at a restaurant during lunch, at which Smith was merely introduced to Piazza, Smith never met with Piazza.

In addition to misstating the record about Smith's efforts to obtain a job with the District Attorney's Office, respondent, by continued use of adverb, adjective, and in-

nuendo, also attempts to paint juror Smith as a person seeking to advance his own career at the expense of respondent. Yet, respondent ignores completely that Smith, neither in his initial application nor in his telephone call to Ms. Sudolnik after the verdict, revealed his status as a juror. Surely, if respondent is correct that by telephoning the day after the verdict, Smith was striking while the "iron was hot" (Brief for Respondent: 22), then it is remarkable that he did not bother to heat the coals by telling Ms. Sudolnik that he had been a juror at Phillips' trial.

Although the trial prosecutor's motives are less significant than those of the juror, respondent is similarly inaccurate in describing the purpose of the trial prosecutor's actions. Thus, respondent argues throughout his brief that the trial prosecutor refused to disclose the juror's application because he sought an unfair advantage by having the juror believe that he had a chance for a job if he voted for conviction. Brief for Respondent: 6, 7, 26-27, 32. Notably, the state judge found the exact opposite: "there is no evidence which to any degree points to a conclusion that . . . [the prosecutor] had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage . . ." Appendix E to Petition for Certiorari: 39a-40a. Of course, as the state court found, the trial prosecutor made a serious error in judgment based on the mistaken belief that there was no reason to disclose the application. *Id.* at 52a. Still, the trial prosecutor intended only that the application not be disclosed (Hearing: 949-54); as found by the state judge, in deciding not to disclose, the prosecutor did not have as an ultimate objective that Smith would remain a juror. Appendix E *supra*: 39a-40a. That a person could so narrowly

focus, and overlook other possibilities or consequences, is well recognized by legal principles which often distinguish between various degrees of deliberate, knowing, reckless and negligent conduct. *See, e.g.,* Model Penal Code §2.02 (1962).

In sum, we agree with Justice Holmes, as quoted by respondent, that "[t]his is not a matter for polite presumptions; we must look facts in the face." *Frank* v. *Mangum,* 237 U.S. 309, 345 (1915). Looking the facts "in the face," the state trial judge found a naive but honest juror who based his verdict on the evidence and only the evidence. In contrast, respondent's insistent refusal to "look the facts in the face" leads him to conclude, with a typical colorful but irrelevant metaphor, that the juror's testimony was similar to "the strenuous insistence of the fabled fox discovered inside the chicken coop that he meant no harm to its occupants." Brief for Respondent: 27. The only fable in this case is respondent's unfounded speculation about the juror's acts as well as the juror's and prosecutor's motives.

**Neither respondent nor the amicus casts any doubt on the adequacy of the post-trial hearing to determine whether the juror was impartial.**

Following a post-trial hearing, juror Smith was found to have been actually impartial.

Respondent and the amicus argue that the post-trial (*Remmer*) hearing is not the constitutional equivalent of a hearing during trial. In the alternative, both respondent and the amicus argue that even though in some situations the post-trial hearing may be the equivalent of a mid-trial

hearing, this is never the case in situations involving alleged misconduct by a juror himself, *i.e.* "internal" misconduct, as opposed to alleged misconduct with the participation of any other person, *i.e.* "external" misconduct.

Turning first to the alleged external-internal distinction, the amicus opines that at a post-trial hearing about whether the juror himself had engaged in misconduct, a juror planning a career in law enforcement would never admit that he himself had disregarded his oath as a juror to further his career. Brief for Amicus: 9-10. The amicus concludes that because the juror would not admit his wrongdoing, the post-trial hearing is ineffective. Likewise, however, during trial a juror is hardly likely to admit that he had deliberately put himself in position to violate his oath. Of course, during and after trial, a juror need not make any such admission, but could merely acknowledge the possibility that he could be, or had been, affected subconsciously by the application.

More significantly, regardless of whether the source of an influence is internal or external, inquiry into a person's state of mind is not unique to alleged misconduct of a juror. There are many situations in criminal prosecutions, and civil trials (as well as other special proceedings), where inquiry is made into a person's state of mind without resort to a conclusive presumption arising from an isolated act. Indeed, as demonstrated by *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980), courts have used post-trial inquiries to determine whether a juror was improperly affected by strictly internal factors. Thus, in *Sullivan*, cited in our main brief but conspicuously ignored by the amicus in its discussion of other cases dealing with this matter (Brief for Amicus:

11), the court held such a post-trial inquiry was the proper procedure to determine whether a juror was affected improperly by an influence completely internal to him—namely, voices that he claimed to have heard (613 F.2d at 467).

Moreover, both respondent and the amicus ignore that there are many circumstances, other than "self-serving" denials, which shed light on a juror's state of mind. A determination of bias, or a lack of bias, may be based upon any number of factors, including the person's background, what he did and said, as well as what he did not do or say, during the period in question. Notably, in *Moody Equipment & Supply Co.* v. *Union National Bank,* —— Ark. ——, —— S.W.2d —— (July 13, 1981), reprinted in Appendix L to the Brief for Respondent, testimony by another witness cast serious doubt on the testimony of a defense witness and a juror about what transpired between him and that juror. Similarly, in the *Remmer* case itself, this Court relied strongly on the fact that during the drive home after the trial had ended, the juror in question had said to two of his fellow jurors that he had "been under terrific pressure. . ." 350 U.S. at 381. As in the *Remmer* and *Moody* cases, here information relevant to the assessment of Smith's alleged bias came from his actions and from the testimony of those with whom he dealt during and after trial.

Further, and most importantly, and completely overlooked by the amicus and respondent, is that the trial judge observed Smith as he testified during direct and cross-examination. Indeed, in *Moody Equipment & Supply Company* v. *Union National Bank, supra,* a case respondent thought so important that he reprinted it in full, the Arkan-

sas Supreme Court explicitly relied on the general rule that appellate courts refrain from reversing a trial judge's determination following an inquiry into possible juror bias because the trial judge had "heard the testimony firsthand" and "the situation presents to him a question that cannot equally well be presented to us by the printed record." Appendix L: 12a; *accord Ristaino* v. *Ross*, 424 U.S. 589, 594-95 (1976).

Here the trial judge observed juror Smith as he testified. After conducting a hearing consuming 1,000 pages of testimony, the trial judge made careful, extensive and fully supported findings of Smith's impartiality. Significantly, in the entire record, there is nothing which at all suggests that the application affected Smith consciously or subconsciously.

As just demonstrated, there are ample sources of information, apart from a juror's word, which enable a court to determine whether a juror has been influenced improperly by an external or even an internal source. Those sources of information are equally available during or after trial. Respondent and amicus argue unpersuasively, however, that post-trial hearings are in other ways not as effective as mid-trial hearings. As made clear at pages 27-28 of our main brief, defense cross-examination at a post-trial hearing may well be more effective than that at a mid-trial hearing, for after trial counsel does not have to tread lightly to avoid antagonizing the juror. Amicus attempts to counter this argument by contending that defense counsel faces the same possibility of antagonizing jurors during *voir dire* questioning that he does during a mid-trial hearing. Brief for Amicus: 14. While not completing the argument, ami-

cus is apparently suggesting that since the *voir dire* is effective, it follows that the mid-trial hearing is equally effective. If true, this merely shows that *voir dire* examination, like mid-trial examination, is less effective than examination at a post-trial hearing. In any event, there are differences between *voir dire* and a mid-trial hearing, and those differences merely reinforce petitioner's argument that the post-trial hearing is at least as effective as the mid-trial hearing.

During *voir dire,* under New York law (Crim. Proc. Law §270.15), counsel asks questions designed to elicit information that may have a bearing on a juror's predisposition toward the accused. Sometime during the examination, counsel generally explains that his aggressive questions are designed to ensure that each juror will be fair and impartial. After selection, each juror selected has passed this stringent test and a juror might well be favorably disposed to an attorney who found that juror to be fair and impartial. Given counsel's explanation, and that similar probing questions often are asked of several jurors, it is most unlikely that any particular juror will feel great antagonism toward counsel, which he would then transfer to counsel's client.

On the other hand, if a trial is interrupted for a hearing on juror bias, the juror knows that he has been singled out by an advocate who believes that he is unfit to serve and desires his exclusion. The harsher the questioning, the more antagonism the juror is likely to feel. Moreover, because the questioning occurs much closer in time to the jury deliberations than does the *voir dire,* the juror's antagonism is still fresh when deliberations begin. Thus, a mid-

trial hearing is not as effective as *voir dire*, and certainly not as effective as a post-trial hearing, which permits full cross-examination of the juror.

Finally, amicus states that a post-trial hearing is inferior "because the only option then available to the judge is to set aside the guilty verdict." Brief for Amicus: 12. However, the amicus seems to acknowledge that such a hearing is adequate to deal with situations of alleged juror misconduct about which the prosecution had no knowledge during trial. Brief for Amicus: 15. Surely then, such a hearing is likewise adequate when the prosecution had prior knowledge of such misconduct, for when the prosecutor learns about alleged misconduct has no bearing on whether a judge can determine a juror's state of mind. Moreover, to the extent that the amicus is implying that New York State trial and appellate judges would not set aside a conviction based upon prejudicial prosecutorial or juror misconduct, it seems grossly misinformed.*

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* *See, e.g., People* v. *Cwikla*, 46 N.Y.2d 434, 441, 386 N.E.2d 1070, 1073, 414 N.Y.S. 2d 102, 106 (1979); *People* v. *Maynard*, 80 Misc. 2d 279, 291, 363 N.Y.S.2d 384, 398 (Sup. Ct. N.Y.Co., 1974) (convictions set aside for prosecutor's failure to disclose evidence); *People* v. *Mullin*, 41 N.Y.2d 475, 480, 362 N.E.2d 571, 574, 393 N.Y.S. 2d 938, 942 (1977); *People* v. *Rivera*, 75 A.D. 2d 544, 546, 426 N.Y.S. 2d 785, 786-87 (1st Dep't 1980) (convictions reversed for improper prosecutorial summation); *People* v. *Brown*, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979); *People* v. *Crimmins*, 26 N.Y.2d 319, 323-24, 258 N.E.2d 708, 710, 310 N.Y.S. 2d 300, 302 (1970); *People* v. *Cocco*, 305 N.Y. 282, 287, 113 N.E.2d 422, 423 (1953) (convictions reversed for juror misconduct or an improper outside influence on a juror).

**This Court has long held that the Constitution requires only the exclusion of jurors who are found to be actually biased and respondent offers neither logic nor policy to overrule well-settled precedent.**

Respondent, without support from the amicus, returns to the district court decision to argue that even though the juror was not actually biased, his application gave rise to a conclusive presumption of "implied" bias. To support that argument, respondent asks this Court to bring within the Sixth Amendment the common law rule that servants could not sit on cases in which their employer was a party. Brief for Respondent: 14-15. Of course, the juror here was not in the employ of a party, so the common law rule offers no support to respondent unless it is expanded to include prospective servants. More importantly, respondent forgets that this Court has clearly and unequivocally rejected the common law rule and declared that, in jury selection, the Constitution is "not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U.S. 123, 146 (1936).*

* In attempting to prove his point that the common law rule is needed as constitutional doctrine, respondent conjures a situation in which all twelve jurors apply for a job with the prosecutor's office. Brief for Respondent: 13. Of course, twelve such applications during trial would be something more than a coincidence and inquiry could well show actual misconduct. However, if upon inquiry all twelve could be shown to be actually impartial, due process would be satisfied. *See Frazier* v. *United States*, 335 U.S. 497, 510 (1948) (no denial of due process even though all twelve jurors were government employees); *Dennis* v. *United States*, 339 U.S. 162, 165 (1950) (even in a politically sensitive case there was no denial of due process even though seven of twelve jurors were government employees). Finally, the hypothesized "packed" jury presents concerns simply not present in the instant case. *See Frazier* v. *United States*, *supra* at 514-520 (Jackson, J., dissenting).

Even when a prospective juror is employed by the prosecuting agency, there is no automatic exclusion. *See id.* at 149-50; *Frazier* v. *United States,* 335 U.S. at 512. As this Court stated in the *Wood* case:

> We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation. 299 U.S. at 149.

Trying to avoid this well settled principle that the Constitution requires challenges to individual jurors only on a showing of actual bias, respondent, again unsupported by amicus, turns desperately to the "appearance of justice" standard. Brief for Respondent: 14, 27-29. The constitutional cases cited by respondent to support his "appearance of justice" argument involve only judges, or racially discriminatory practices. These are, of course, the only exceptions to the actual prejudice requirement, and have already been discussed at pages 32-33 and 46-48 of our main brief. As noted in our main brief, possible racial or, for that matter, other invidious discriminations are treated with special concern, because the injection of such prejudice into criminal proceedings has implications for society far beyond the courtroom. *See Rose* v. *Mitchell,* 443 U.S. 545, 555-56 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522, 532-33 (1975); *see also Peters* v. *Kiff,* 407 U.S. 493 (1972). And as pointed out on page 47 of our main brief, there are good reasons why the bias of judges has always been treated specially. Notably, respondent utterly fails to challenge these reasons and show why an "appearance of justice" standard, rather than the traditional actual bias standard, should gov-

ern. Respondent does attempt to support his "appearance of justice" argument by observing that "it is impossible to know what effect Smith had on other jurors prior to or during deliberations." Brief for Respondent: 28. The argument is curious, for if Smith was actually impartial, his "effect" on other jurors was only the proper influence which all impartial jurors have upon one another. The "appearance of justice" is hardly undercut by such an influence.

Further, an "appearance of justice" standard is not appropriate for general application to individual jurors because it is so amorphous as to be no standard at all. As such, it seems particularly ill-suited to federal habeas corpus review, or even direct review, of state convictions. In sum, in cases involving the right to an impartial jury other than those involving systemic defects, as the Court has recently reaffirmed, a showing of actual prejudice is required. *See Chandler* v. *Florida*, —— U.S. ——, 101 S. Ct. 802, 813-14 (1981).

Finally, in support of an "appearance of justice" standard, respondent argues that "the recent carnage and bloodshed in Miami and other cities should not be the touchstone of a civilized response to injustice, real or imagined." Brief: 30. The relationship between the trouble in our cities and a new trial for this corrupt police officer, convicted of brutally murdering two people in New York City, is murky to say the least. Moreover, the law of the street is hardly an appropriate consideration in determining the requirements of the United States Constitution. Of course, real injustice calls for a civilized response, and if the juror in question had been found to have been actually biased,

that response would have been a new trial. Because the juror was not actually biased, however, there was nothing uncivilized about the state courts' refusal to set aside the conviction. By suggesting that only an appearance of justice standard is "civilized" and that such a standard requires a new trial for him, respondent desires a real remedy for an imaginary injustice. Imaginary injustice, however, should not be the concern of federal courts in reviewing state convictions in habeas corpus proceedings.

**Neither respondent nor the amicus has shown that the respondent was prejudiced by the prosecutor's failure to disclose the juror's application during trial.**

Pointing to no prejudice whatsoever, respondent argues that the failure to disclose the juror's application during trial requires affirmance. Brief for Respondent: 37. Of course, as seen by the authorities cited on pages 32-33 of our main brief, this Court has made it clear that a federal court may not interfere in a state prosecution by ordering a new trial because of prosecutorial misconduct which did not prejudice an accused.

In his argument about prosecutorial misconduct, counsel for respondent muses about what would happen to him, in terms of disciplinary or criminal proceedings, if a juror had applied to him for a job and he had decided not to disclose the fact until after trial. Of course, whatever would happen to defense counsel, the verdict would not be affected. On the other hand, we do not argue that whatever the conduct of the prosecutor the verdict should remain inviolate. But surely, a requirement of prejudice from prosecutorial

misconduct fully protects a defendant's right to a fair trial. If some other societal interest calls for further protection, then a prosecutor's conduct is subject to the same disciplinary and criminal review as that of a defense counsel. Notable by its absence from the petition is any allegation that respondent filed a grievance with the bar association, or sought appointment of a special prosecutor to make inquiry into the trial prosecutor's conduct.

Interestingly, respondent closes his brief (pp. 39-40) by referring to that portion of the majority opinion in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 195 (1978) in which Chief Justice Burger quotes a statement ascribed to Sir Thomas More, that even the devil must be given the benefit of the law. However, in the state courts William Phillips was treated fairly and in accordance with the law. Now he wants more than is due him; he seeks to have the federal courts supervise the conduct of state prosecutors and grant him a new trial, even though he was not prejudiced by the conduct of the prosecutor. In seeking even more than that required by the Constitution, respondent wants to deprive the state of the process due it—freedom from federal interference with a state conviction because of prosecutorial misconduct that has not prejudiced the accused.

Significantly, in *Tennessee Valley Authority* v. *Hill*, *supra*, in which the quoted statement of Sir Thomas More appears, the Court refused to preempt congressional action, preemption which would have violated the constitutional system's commitment to the separation of powers. Given the absence of prejudice, here too the Court should refuse

to preempt state court actions, preemption which would violate the constitutional system's commitment to federalism.

The amicus seeks to provide the prejudice by arguing that a post-trial hearing is not as effective as a hearing during trial. We have responded to this argument at pages 6-11 of this reply brief and pages 26-27 of the main brief. Nonetheless, two points raised by the amicus merit brief response.

At pages 25-27 of our main brief, we demonstrated that a post-trial hearing is the appropriate procedure to determine whether a juror engaged in misconduct during trial which influenced his verdict, and that the adequacy of the post-trial hearing is not affected by whether or not the prosecutor knew of the misconduct during trial. At pages 4 and 5, the amicus correctly states that "[t]his argument, . . . is the keystone of petitioner's brief." But amicus then incorrectly states that the argument "was unequivocally rejected by this Court in *United States* v. *Agurs*, 427 U.S. 97, 111 (1976)."

At the cited page in *Agurs* (427 U.S. at 111), the Court rejected an argument that when a prosecutor fails to disclose evidence, a defendant to obtain a new trial should have to satisfy the burden applicable in newly discovered evidence cases, of showing that the withheld evidence would have resulted in acquittal. While rejecting that argument, the Court did not hold that a hearing or inquiry would necessarily be inadequate to establish the absence of prejudice. Indeed, by requiring prejudice from the fail-

ure to disclose (427 U.S. at 108), the Court by definition recognized the need for inquiry. Here, inquiry was called for and held. At that inquiry, the state court did not require the accused to shoulder any burden. Rather, the state judge put the prosecution to the heaviest burden and then concluded beyond a reasonable doubt that the juror was impartial, and that respondent was not prejudiced by the failure to disclose. This, of course, is in complete accord with the teaching of *Agurs*. What is contrary to *Agurs* is respondent's idea that once prosecutorial misconduct is shown, then no consideration should be given, with appropriate allocation of the burden of proof, to whether that misconduct prejudiced respondent.

Given the reasonable doubt standard used by the state judge, it matters little into which of the three *Agurs* categories the prosecutor's failure to disclose falls. Nonetheless, also deserving of brief comment is the attempt of amicus to force the prosecutor's failure to disclose information about the juror into the category encompassing perjured testimony, in which convictions are set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (427 U.S. at 103-04).

The extent of amicus' analysis is that when prosecutors withhold information which would expose false testimony, they act reprehensively. Here, according to amicus, the prosecutor's conduct is equally egregious; thus, it argues that the conduct here must be in the same category as that involved in the false testimony cases. Brief for Amicus: 6. This conclusory analogy is, of course, no sub-

stitute for analyzing the nature of prosecutorial conduct to determine into which category it falls.

Here, there is no *voir dire* answer or any other testimony by the juror which the prosecutor knew to be false, as in the false testimony cases. Rather, the prosecutor merely discovered, but failed to disclose, information about a juror's conduct after trial had commenced, which could have conceivably affected a determination of the juror's impartiality. To be sure, a juror's impartiality is at the core of the right to a fair trial. But so too is the requirement of proof beyond a reasonable doubt and the defendant's right to offer exculpatory evidence. Yet the failure to disclose unrequested evidence affecting guilt or innocence, falls into the third *Agurs* category, which requires a new trial if the undisclosed evidence "creates a reasonable doubt which did not otherwise exist." 427 U.S. at 112.* Thus, in this juror context, the failure to disclose should be treated no differently from the failure to disclose evidence which could conceivably affect a jury's determination of guilt or innocence. In any event, regardless of the standard, the hearing showed that there was neither a reasonable doubt about juror Smith's impartiality nor a reasonable likelihood that he was actually biased. The Constitution requires no more.

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* The second *Agurs* category involves the failure to respond to a request for specific information, but the duty to honor that request is breached and a new trial required only when the suppressed evidence "might have affected the trial" (427 U.S. at 104). This seems no different from the test for determining whether to order a new trial because perjured testimony is knowingly permitted by a prosecutor. *See,* 427 U.S. at 103-04. Despite the absence of a request, the court below put this case in this second category but like the amicus was none too clear or persuasive in its reasons for doing so (*see* Appendix A to Petition for Certiorari: 9a).

In sum, juror Smith was naive but impartial. Respondent's adjectives, adverbs, and innuendos are no substitute for the state judge's fully supported findings of the juror's actual impartiality; actual impartiality is all that is required by the Constitution. Nor is it open to persuasive argument that the post-trial hearing was constitutionally inadequate to determine that impartiality; thus, the prosecutor's failure to disclose the juror's letter during trial in no way prejudiced respondent's right to explore fully that impartiality.

## Conclusion

***The judgment appealed from should be reversed.***

Respectfully submitted,

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